No. 91-72

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether private horizontal price-fixing is "actively supervised" by the State (for purposes of implied exemption from the federal antitrust laws) where prices are filed with a state agency but state officials do not determine whether the prices meet the State's regulatory criteria.

2. Whether the court of appeals properly deferred to the Federal Trade Commission's findings of fact.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Chicago Title Insurance Company, SAFECO Title Insurance Company (now operating under the name Security Union Title Insurance Company), Lawyers Title Insurance Corporation, and Stewart Title Guarantee Company were respondents before the Federal Trade Commission and petitioners in the court of appeals. First American Title Insurance Company was a respondent before the Commission; it settled the charges against it by consent agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 922 F.2d 1122. The opinion and final order of the Federal Trade Commission (Pet. App. 41a-136a), and the initial decision of the administrative law judge (Pet. App. 137a-250a), are reported at 112 F.T.C. 344.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 39a-40a. On June 2, 1991, Justice Souter extended the time for filing a petition for certiorari to and including July 10, 1991. The petition was filed on that date, and was granted on October 7, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 5(a)(1) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a)(1), provides:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 5(c) of the FTC Act, 15 U.S.C. 45(c), provides, in pertinent part:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

STATEMENT

This case concerns horizontal price-fixing by respondents, five large title insurance companies. The ultimate issue is the meaning of the "active state supervision" requirement in the context of the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

1. Respondents insure buyers of real property against losses due to certain defects in title. In 1982, respondents together accounted for 57% of the $1.35 billion market for title insurance. Pet. App. 145a. Respondents charge their customers a relatively small fee for title insurance, and a relatively large fee for conducting a title search and examination. *Id.* at 180a. A title search is a compilation, in chronological order, of publicly recorded instruments in the chain of title to a parcel of real property. A title examination is an evaluation of the legal significance of those instruments. Title searches and title examinations are performed by private attorneys and commercial title abstract companies as well as by title insurance companies. See *Id.* at 147a-180a.[1]

Beginning in the 1960s, respondents organized "rating bureaus" in a number of States to set uniform prices for title search and examination services. Pet. App. 4a, 217a. The rating bureaus agreed on uniform rate schedules that were filed with state insurance departments. In the four States at issue in this case—Wisconsin, Montana, Arizona, and Connecticut—respondents' rates were effective unless disapproved by state insurance officials.[2] Although respondents' rates were not disapproved, state officials did not determine that the rates were consistent with the States' regulatory policies. (State insurance law generally requires that insurers' rates not be excessive, inadequate,

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[1] This case concerns only respondents' collective setting of uniform rates for title search and examination services. The Commission did not challenge respondents' collective setting of insurance rates.

[2] In Wisconsin, rates do not have to be filed until 30 days after they take effect. Pet. App. 197a. In Montana, rates are effective upon filing with the state insurance department. *Id.* at 212a. In Arizona and Connecticut, insurers must wait for a prescribed period after filing rates (30 days in Connecticut, 15 days in Arizona) before using them. *Id.* at 190a, 201a.

or unfairly discriminatory. Pet. App. 97a, 190a, 202a, 212a.) The question in this case is whether respondents' price-fixing nevertheless met the legal criterion of being "actively supervised" by the States, and therefore is exempt from the federal antitrust laws, under the state action doctrine of *Parker* v. *Brown, supra,* and subsequent decisions of this Court.

2. In January 1985, the Commission issued an administrative complaint alleging that respondents had engaged in an unfair method of competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45, by collectively setting rates for title search and examination services. The complaint listed 13 States as "[e]xamples of states in which * * * Respondents have fixed prices." Pet. App. 45a (quoting Compl. para. 11). In their answer to the FTC's complaint, respondents argued, among other things, that their price-fixing took place pursuant to clearly articulated state policies and was actively supervised by the States at issue. Consequently, respondents argued, their price-fixing was exempt from the antitrust laws under the state action doctrine.

In December 1986, the administrative law judge issued a decision concluding that respondents' price-fixing, which plainly violated the FTC Act unless it was exempt from the federal antitrust laws, was exempt from the antitrust laws under the state action doctrine in some States, but not in others.[3] Pet. App. 137a-250a.

3. In September 1989, the Commission issued an opinion and final order prohibiting respondents from collectively setting and adhering to rates for search and examination services except "where such collective activity is

[3] The ALJ concluded that respondents' collective rate setting was actively supervised by Arizona and Montana, but not by Connecticut or Wisconsin. Pet. App. 241a-243a.

engaged in pursuant to a clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body." Pet. App. 42a.

The Commission "h[e]ld that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate." *Id.* at 55a. The Commission observed that the active supervision requirement ensures "that the [private] actor is engaging in the challenged conduct pursuant to state policy." Pet. App. 53a (quoting *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 46 (1985)). Accordingly, the Commission stated, the active supervision requirement is satisfied only where state officials "have and exercise the power to review particular anticompetitive acts." Pet. App. 53a (quoting *Patrick* v. *Burget,* 486 U.S. 94, 101 (1988)). The Commission noted that "[t]he mere presence of some state involvement or monitoring does not suffice" to demonstrate active state supervision. Pet. App. 54a (quoting *Patrick,* 486 U.S. at 101). Thus, the Commission reasoned, "isolated instances of review" do not shield unreviewed private activity. Pet. App. 54a. Moreover, the Commission stated that "[n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." *Id.* at 55a (quoting *New England Motor Rate Bureau, Inc.,* 112 F.T.C. 200, 277 (1989)).

The Commission held that respondents' activities were not actively supervised in four States—Wisconsin, Montana, Connecticut, and Arizona.[4]

[4] The Commission also rejected respondents' arguments that title search and examination services are part of the "business of insurance," and therefore exempt from Commission review under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), Pet. App. 78a-99a, and that respondents' price-fixing was protected under the *Noerr-Pennington* doctrine, *id.* at 99a-105a.

a. As to Wisconsin, the Commission concluded that respondents' uniform rates were "the product of private and not state action." Pet. App. 62a-63a. The Commission adopted the ALJ's findings that the State had "followed a 'hands-off policy in dealing with title insurers.' " *Id.* at 62a. Indeed, the Commission observed that in Wisconsin "no hearing has ever been held * * * on *any* insurance rate filing, and no rate suspension order has ever been issued." *Id.* at 60a. The Commission noted that respondents' 1971 rate filing remained in effect for years, even though the supporting data necessary to determine whether the rates met the State's regulatory criteria were not filed with the State until 1978. *Id.* at 60a-61a. The Commission adopted the ALJ's finding that respondents' 1981 filing, which raised rates by 11%, was "allowed to go into effect (*i.e.*, not disapproved)" after state officials checked only the mathematical accuracy of the filing. *Id.* at 61a, 199a. Moreover, the "1982 filing was given a 'cursory reading' " and the supporting materials "were not even checked for accuracy." *Id.* at 61a, 200a. In addition, the Commission found that "nearly two dozen endorsements and amendments went into effect without being examined at all." *Id.* at 63a.

b. As to Montana, the Commission found that "the record demonstrates that rates from [respondents'] 1983 filing went into effect without being examined." Pet. App. 76a. The Commission observed that a rating bureau representative met with state insurance officials and was told that, although the increase would go into effect immediately, additional supporting data would have to be filed with the insurance department. *Id.* at 74a. There was no evidence that respondents ever submitted the required supporting data. *Ibid.* The Commission rejected the argument that the active supervision requirement was satisfied by hearings "held three years before the formation of the

rating bureau" concerning "restrictive legislation designed to keep * * * attorneys, real estate brokers, and lending institutions * * * out of the title insurance business." *Id.* at 75a. The Commission agreed with complaint counsel that "such hearings cannot substitute for supervision of the price-fixing in question." *Id.* at 75a-76a. Similarly, the Commission concluded that Montana's enactment of legislation after respondents' price-fixing did not constitute active supervision of respondents' private anticompetitive activity. "Otherwise," the Commission observed, "states would have carte blanche to enact laws retroactively immunizing entities from liability after they had violated a federal statute." *Id.* at 76a.

c. As to Arizona, the Commission adopted the ALJ's finding that there was "no convincing evidence that the [1968] rate was either justified by the [rating] bureau or reviewed by the state." Pet. App. 68a, 202a n.233. The Commission found that the insurance department never examined respondents' rating bureau at any time during the 13 years of its existence, despite a state statutory requirement that such examinations be conducted at least once every five years. *Id.* at 63a. The Commission also accepted the ALJ's findings that there is no evidence in the record that justifications were submitted for "minor rate adjustments * * * filed throughout the period 1968 to 1980 * * *, and the record is inconclusive as to the kind of review, if any, to which they were subject." *Id.* at 67a.

The Commission rejected respondents' argument that the active supervision requirement was satisfied by the State's involvement in respondents' attempt to raise escrow fees. State supervision of escrow fees is not state supervision of title search and examination fees, and "[a] state may not pick and choose which classifications of rates it is

going to supervise actively and which it will ignore."[5] Pet. App. 68a.

d. As to Connecticut, the Commission accepted the ALJ's finding that crucial aspects of respondents' collective ratemaking activity "were not being supervised at all." Pet. App. 56a. There was no showing that Connecticut officials examined respondents' expenses, a factor that the state regulators themselves identified as crucial to determining whether respondents' rates met the State's regulatory criteria. Pet. App. 57a. Indeed, the Commission found that state officials believed that they lacked authority to regulate insurer expenses. *Id.* at 59a. The Commission explained that "when the state regulator responsible for implementing the statutory scheme admits a lack of significant control over the restraint in question, the rates are the product of private action." *Ibid.*

In addition, the Commission found that Connecticut officials had "simply ignor[ed] some [rate] filings because they d[id] not involve generalized rate increases." Pet. App. 60a. The Commission noted that "there is no *de minimis* exception to the antitrust laws for price-fixing." *Ibid.* While the Commission recognized that sampling techniques might be sufficient to satisfy the active supervision requirement, mere "hit-and-miss review" was not sufficient. *Ibid.*[6]

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[5] The Commission also rejected the argument that its claim was barred by principles of res judicata. An earlier action, *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983), had challenged respondents' collective setting of escrow fees. The Commission noted that respondents' collective setting of title search and examination fees preceded their collective setting of escrow fees by about a decade. Pet. App. 71a.

[6] Commissioner Azcuenaga dissented in part. Pet. App. 111a-126a. She concluded that respondents' collective ratemaking was actively supervised in Arizona and Connecticut, but not in Wisconsin and Montana. Commissioner Calvani agreed with the Commission's resolution of the active supervision question, but disagreed with the Commission's determination that Pennsylvania and New Jersey had not clearly articulated a policy allowing respondents to determine uniform rates. Pet. App. 109a-110a. The "clear articulation" issue is not before this Court.

4. The court of appeals reversed. Pet. App. 1a-38a. The court noted that respondents "do[ ] not dispute the FTC's holding that the horizontal price-fixing agreements among five of the nation's largest title insurance companies * * * were anticompetitive and unfair within the meaning of § 5 of the FTC Act." *Id.* at 2a. But the court of appeals held that respondents' price-fixing activities were exempt under the state action doctrine.[7]

The court of appeals recognized that "[i]n the aftermath of *Patrick*, it is clear that the active supervision test requires that the state 'have and exercise' the power to review the particular anticompetitive acts." Pet. App. 27a. The court noted that this Court has articulated four factors that are relevant to determining whether the active supervision requirement has been met: "(1) whether the state establishes the rates; (2) whether the state reviews the reasonableness of the rates; (3) whether the state monitors market conditions; and (4) whether the state ha[s] engaged in any 'pointed reexamination' of its program." *Ibid.* (citing *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 (1987); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980)).

Having recited the factors identified by this Court as relevant to active supervision, the court of appeals stated that "[w]e believe the First Circuit's recent opinion in *New*

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[7] The court of appeals did not reach respondents' additional arguments that their price-fixing was protected under the McCarran-Ferguson Act and the *Noerr-Pennington* doctrine. Pet. App. 38a n.17. None of those issues is before this Court.

England Motor Rate Bureau, Inc. v. *FTC*, 908 F.2d 1064 (1990) ["*NEMRB*"], is most instructive on what type of showing is necessary to satisfy *Midcal*'s active supervision prong." Pet. App. 27a. The court of appeals then adopted the following standard for determining whether a State actively supervises private anticompetitive activity:

> Where * * * the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.

Id. at 28a (quoting *NEMRB*, 908 F.2d at 1071).

The court of appeals held that each of the four States at issue satisfied its version of the active supervision test.

a. As to Wisconsin, the court of appeals construed state law to "require[ ] Wisconsin's state-run Insurance Department to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate, or unfairly discriminatory," and "to reject rates following a hearing if they do not meet the statutory criteria." Pet. App. 36a (citing Wis. Stat. Ann. §§ 625.11(1), 625.22 (West 1980)). The court further concluded that the officials' duty to review all rate filings was enforceable in a mandamus proceeding in state courts. Pet. App. 36a.

The court concluded that Wisconsin officials had "demonstrated some basic level of activity directed towards seeing that [respondents] carried out the state's policy." *Id.* at 36a-37a. The court did not question the Commission's finding that state officials had not determined whether respondents' rates were consistent with the

State's regulatory criteria. Instead, the court found it sufficient that "Wisconsin's Insurance Department raised questions regarding the 1971 filing" and "later ruled that it was acceptable."[8] The Insurance Department "checked the 1981 filing for accuracy." And the 1982 filing "also received some review from the Insurance Department." *Id.* at 37a.

b. As to Montana, the court concluded that state officials were required to assure that all rate bureau filings complied with state statutory requirements, and to reject rates that did not meet these criteria. Pet. App. 34a (citing Mont. Code Ann. §§ 33-1-311, 33-16-201, 33-16-203 to 33-16-206, 33-16-211 (1989)). Thus, the court reasoned, an action for a writ of mandamus would be available to compel insurance officials to determine whether a particular rate met the State's statutory criteria. Pet. App. 35a.

The court concluded that Montana's program of supervision was staffed and funded, and that state officials had demonstrated "some basic level of activity." Pet. App. 35a. Again, the court did not question the Commission's finding that Montana officials had not determined whether respondents' rates were consistent with the State's regulatory policies. Rather, the court held that it was sufficient that "someone from Ticor's rating bureau met with officials of Montana's Insurance Department," who "told Ticor's representative that the increase would go into effect immediately and approved the filing." *Ibid.* Although the state officials "requested additional supporting data," "[t]here is no evidence that [respondents] ever supplied

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[8] As discussed below, note 16, *infra*, state officials may accept a rate schedule for filing because it complies with the State's requirements as to form and procedure. That type of "acceptance" or "approval" is not the same as approving the rates themselves as consistent with the State's substantive regulatory criteria. The court of appeals' opinion did not distinguish between these two different kinds of approval.

the supporting data," *id.* at 35a & n.16. The court nevertheless concluded that "the quantity of Montana's actions [was] sufficient to allow [respondents] to invoke the state action doctrine." *Id.* at 35a.

c. As to Arizona, the court noted the Commission's finding that respondents' "1968 filing went into effect essentially unreviewed," and that "Arizona's Insurance Department failed to undertake a formal examination of the rating bureau." Pet. App. 29a. But the court concluded that Arizona officials had the power to regulate respondents' price-fixing, because state law required the officials to determine that all rates filed with the department complied with the State's regulatory standards, and to reject any rates that did not meet the State's criteria. *Id.* at 30a (citing Arizona Rev. Stat. Ann. §§ 20-375(A), 20-376(D), 20-378(A) (1990)). In addition, the court found, Arizona had a regulatory program in place, staffed, and funded during the relevant period, and the state officials' duty to enforce the law was enforceable through mandamus proceedings in Arizona's state courts. Pet. App. 30a-31a.

The court also concluded that Arizona officials had engaged in "some basic level of activity." The court relied on testimony by an Arizona insurance official that every filing submitted from 1973 to 1982 was scrutinized to see if it met the State's statutory requirements. In addition, the court noted the ALJ's finding that no filing went into effect until it was marked "approved" by the director of the Insurance Department. Pet. App. 31a.

d. As to Connecticut, the court concluded that state officials had the power and duty "to make sure that all rate bureau filings complied with the statutory requirement that rates not be excessive, inadequate or unfairly discriminatory," and to reject any rates that did not satisfy

these standards. Pet. App. 32a-33a (citing Conn. Gen. Stat. Ann. §§ 38-201p(b), 38-201x(a)(2), 38-201x(b)(2) (West 1987)). Connecticut's "program of supervision * * * was staffed and funded" and "the duty to regulate" was enforceable through mandamus proceedings in Connecticut's state courts. Pet. App. 33a.

The court also concluded that Connecticut met its "basic level of activity" test. Pet. App. 33a. The court relied on testimony by a state insurance official that the State Insurance Department reviews every filing it receives. *Ibid.* And the court of appeals stated that state officials had approved respondents' rate filings in 1966, 1981, and 1983. *Ibid.* The court concluded that the "basis of the FTC's contrary holding" was its conclusion, explained in Commissioner Strenio's separate opinion, that respondents' commissions to their agents were excessively high. Pet. App. 33a-34a.

SUMMARY OF ARGUMENT

1. The court of appeals adopted an incorrect legal standard for determining when private anticompetitive conduct is "actively supervised" by the State. In *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court adopted a rigorous two-prong test for determining whether private conduct is exempt from the antitrust laws under the state action doctrine: the restraint on competition must be one that is both "clearly articulated and affirmatively expressed as state policy" and " 'actively supervised' by the State itself." 445 U.S. at 105. The state action exemption applies "only if the State effectively has made [the challenged] conduct its own"; accordingly, the active supervision test requires that state officials both "have and exercise power to review particular anticompetitive acts of private parties," and the

exemption is limited to "the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick* v. *Burget*, 486 U.S. 94, 100-101, 106 (1988).

The court of appeals adopted a watered-down version of the active supervision test, under which it is sufficient to show that the State's regulatory program is staffed, funded, and has demonstrated "some basic level of activity." Pet. App. 28a. The court of appeals' legal standard is inadequate because it provides no assurance that private anticompetitive activity is consistent with state policy.

In effect, the court of appeals' legal standard abandons the "active supervision" requirement, thus opening a gap in which private anticompetitive behavior that is not actively supervised by the State is nevertheless exempt from the federal antitrust laws. Principles of federalism do not require or justify such a result. Indeed, the court of appeals' standard actually restricts the States' regulatory choices, by raising the possibility that a relatively modest program of state regulation would have the drastic consequence of immunizing private anticompetitive conduct from the federal antitrust laws.

The court of appeals' application of its novel legal standard to the facts found by the Commission in Wisconsin and Montana illustrates its flaws. Under state law, respondents' rates were effective unless disapproved by state officials. Although state officials did not reject respondents' rates, the officials did not determine that the rates met the States' substantive regulatory criteria. Thus, there is no basis for concluding that respondents' anticompetitive price fixing was consistent with state policy.

The court of appeals also erred in relying on the assumed availability of mandamus proceedings in state courts as a basis for active supervision. In the States at

issue, insurance officials have discretion to determine whether a particular rate filing meets the State's regulatory criteria. Because mandamus is not available to compel an official to perform a discretionary function, it is not available in the circumstances of this case. In any event, the mere possiblity of judicial review is not sufficient to meet the active supervision requirement. Aggrieved consumers may lack sufficient resources and incentive to bring suit. Moreover, anticompetitive conduct that is not consistent with the State's policies might well continue for months or years under a system that limited state supervision to *post hoc* litigation in state courts.

2. The court of appeals also failed to adhere to the statutory requirement that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). Rather than accepting the Commission's factual findings, the court of appeals made its own appraisal of the testimony. In Arizona, for example, the court disregarded the Commission's findings that there was no convincing evidence that respondents' major rate filing in 1968 was reviewed by the State, and that the record is inconclusive as to whether various minor rate adjustments received any review. Instead, the court of appeals relied on isolated pieces of evidence that do not warrant departure from the factual findings of the Commission. Similarly, the court disregarded the Commission's finding that crucial elements of respondents' rates in Connecticut were not supervised at all. Again, the court of appeals made its own appraisal of the testimony and substituted its own view of the evidence for that of the Commission. Under the Commission's findings, which should have been upheld, the "active state supervision" requirement was not met in Arizona or Connecticut.

ARGUMENT

I. THE "ACTIVE STATE SUPERVISION" TEST REQUIRES STATE OFFICIALS TO DETERMINE THAT PRIVATE ANTICOMPETITIVE ACTIVITY IS CONSISTENT WITH STATE POLICY

The basic question in this case is whether private price-fixing agreements are "actively supervised" for purposes of the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943), and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), absent a determination by state officials that the terms of the agreements are consistent with the State's policy. Our submission is that the state action doctrine, and the principles of federalism on which it is based, require such a determination.

A. "Active State Supervision" Is Required to Exempt Private Anticompetitive Conduct As Consistent With the State's Regulatory Policies.

In *Parker* v. *Brown, supra,* this Court held that the Sherman Act did not invalidate a California statute that authorized a state commission to impose price-enhancing restrictions on private raisin producers. Essential to the Court's decision in *Parker* was the fact that "it is the state, acting through the Commission, which adopts the program and which enforces it." 317 U.S. at 352. *Parker* was based on principles of federalism. As the Court observed (*id.* at 350-351): "In a dual system of government * * * an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

This Court has rejected efforts to expand the state action exemption beyond the limits established by principles of federalism. See, *e.g., Community Communications Co.*

v. *City of Boulder,* 455 U.S. 40, 70 (1982) (Rehnquist, J., dissenting) (The "federal interest in protecting and fostering competition is not infringed" so long as "it is truly the government, and not the regulated private entities, which is replacing competition with regulation"). *Parker* expressly recognized that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351 (citing *Northern Securities Co.* v. *United States,* 193 U.S. 197, 332, 344-347 (1904)). See also *City of Columbia* v. *Omni Outdoor Advertising, Inc.,* 111 S. Ct. 1344, 1353 (1991). This Court's subsequent decisions have recognized that the state action exemption does not apply to private conduct unless state officials determine that the particular private activity furthers, or at least is consistent with, the State's policies.

In *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc., supra,* the Court established a rigorous two-prong test for determining whether private anticompetitive activity is impliedly exempt from the antitrust laws under the state action doctrine: the exemption does not apply unless the challenged restraint is both "clearly articulated and affirmatively expressed as state policy," and " 'actively supervised' by the State itself." *Midcal,* 445 U.S. at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 410 (1978) (plurality opinion)). The Court held that the State did not actively supervise the wine pricing arrangement at issue in *Midcal* because the State did not establish prices, review the reasonableness of prices, monitor market conditions, or engage in any "pointed reexamination" of the program. 445 U.S. at 105-106. Instead, "[t]he State simply authorize[d] price setting and enforce[d] the prices established by private parties." *Id.* at 105. The Court held that this was "essen-

tially a private price-fixing arrangement" and therefore outside the exemption for state action, notwithstanding "a gauzy cloak of state involvement." *Id.* at 106.

The active supervision requirement is fundamental to proper confinement of the scope of the implied exemption recognized in *Parker* v. *Brown*. That exemption is based on reluctance to assume that the federal statutes broadly prohibiting anticompetitive commercial practices, even though comprehensively drafted, were meant to prohibit acts of the States themselves. Cf. *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991). But that judicially implied exemption cannot properly be extended to allow the States merely to immunize private conduct from prohibitions enacted by Congress. It is not the province of the States to repeal the federal antitrust laws, industry by industry, and substitute authorization of privately imposed trade restraints.

This Court's decisions subsequent to *Midcal* have, if anything, further strengthened the active supervision requirement.[9] In *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 n.7 (1987), the Court held that state monitoring that does not exert "significant control" over the terms of a private restraint does not qualify as active supervision. Most recently, in *Patrick* v. *Burget*, 486 U.S. 94 (1988),

[9] In *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985), which concerned collective ratemaking by motor carriers, the Court noted that, under the regulatory scheme there at issue, "[a] proposed rate becomes effective if the state agency takes no action within a specified period of time," and that state agencies "have and exercise ultimate authority and control over all intrastate rates." *Id.* at 50-51. In that case, unlike this one, the government conceded that the state agencies actively supervised the private collective ratemaking. *Id.* at 62. Accordingly, only application of the "clear articulation" prong of the *Midcal* test was at issue in this Court. In *Southern Motor Carriers*, moreover, the regulatory commissions did in fact consistently require hearings. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979).

the Court explained in detail that *Parker*'s exemption for "state action" shields private conduct from the antitrust laws only when "the State effectively has made [the] conduct its own." *Patrick* v. *Burget*, 486 U.S. at 106. The Court recognized that private parties must be presumed to be acting "to further [their] own interests, rather than the governmental interests of the State." *Patrick*, 486 U.S. at 100 (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985)). The active supervision requirement "is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." 486 U.S. at 101. Accordingly, the active supervision test "requires that state officials have *and exercise* power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ibid.* (emphasis added).[10]

These governing principles apply in a straightforward way to the type of state regulatory scheme at issue in this case, under which private decisions take effect unless disapproved by state officials. This Court's decisions plainly indicate that mere failure to object to private activity is not sufficient to confer antitrust immunity.[11] "Active super-

[10] This Court's strict formulation of the active supervision requirement is reflected in the views of commentators that the essential inquiry is "whether the operative decisions about the challenged conduct [were] made by public authorities or by private parties themselves." 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213b, at 73 (1978); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668 (1991) (no state action exemption where persons controlling the terms of the restraints stand to profit from them).

[11] As leading commentators have observed, in the context of a regulatory scheme where "[t]ariff provisions • • • take effect unless the [state] agency takes affirmative steps to suspend or disapprove them, • • • [a]gency inaction is not sufficient to justify immunity." 1 P.

vision" means more than inaction or passive acquiescence. It requires an affirmative determination by state officials that the particular private anticompetitive activity at issue is consistent with State policy. *Patrick, supra*; *Midcal, supra*. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976) (no antitrust immunity conferred where a state passively accepted a public utility's tariff). Nothing less suffices to convert private anticompetitive conduct into action of the State itself, which is all that is impliedly exempt from the federal antitrust laws.[12]

Areeda & D. Turner, *Antitrust Law* ¶ 213f, at 77-78 (1978). "Inaction normally does not reflect any agency desire to approve," but instead reflects, at most, a choice by state officials to direct their limited enforcement resources into other areas. *Id.* at 78. Moreover, official inaction is insufficient to meet the active supervision requirement because it does not "assure conscious consideration by those particular state officials charged with the power and responsibility for approval." *Id.* at 78-79.

[12] In a "somewhat similar," although "by no means identical," context, *National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 194 n.14 (1988), the Court has rejected the argument that inaction or mere acquiescence by the State converts private action into state action. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 354-357 (1974), the Court held that termination rules included in a utility's general tariff, but not scrutinized by the Public Utility Commission, were not state action for purposes of 42 U.S.C. 1983. The Court rejected the plaintiffs' argument that because the Public Utility Commission had the latent power to reject the disputed rules within the 60-day statutory notice period, the utility's termination of electrical service was transmuted into state action. The Court observed that "the sole connection of the [state agency] with [the] regulation was [the utility's] simple notice filing with the [Public Utility] Commission and the lack of any Commission action to prohibit it." 419 U.S. at 355. The Court concluded that this was not sufficient to convert the utility's action into state action for purposes of Section 1983. *Id.* at 357. See also *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible * * * under the terms of the Fourteenth Amendment."); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164 (1978).

B. The Court of Appeals' Revision of the Active Supervision Test Would Shield Private Decisionmaking from the Antitrust Laws

The court of appeals adopted a reformulation of the active supervision test that would confer antitrust immunity on private parties if a State regulatory program is staffed, funded, confers on state officials "ample power and the duty to regulate pursuant to declared standards of state policy," is enforceable in the state courts, and "demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy." Pet. App. 28a. The court of appeals did not purport to derive its legal standard from any decision of this Court. Indeed, the court of appeals' test is incompatible with this Court's firm insistence that state officials actually exercise their power to determine whether private anticompetitive conduct is consistent with state policy. See *Patrick* v. *Burget*, 486 U.S. at 101.[13]

The principal defect in the court of appeals' legal standard is that it confers antitrust immunity even in the absence of a determination by state officials that the particular private anticompetitive activity at issue is consistent with state policy. When the State makes such a determina-

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[13] Although the court of appeals purported to follow the decision of the First Circuit in *New England Motor Rate Bureau, Inc.* (*NEMRB*) v. *FTC*, *supra*, in fact the Third Circuit's decision goes considerably further than the First Circuit's decision in *NEMRB*. In *NEMRB*, the First Circuit concluded, on the basis of the parties' stipulation, that "the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory criteria of the statute" and that "unreasonable rates [are] rejected" by state regulators. 908 F.2 at 1077. Based on that view of the stipulations, the result reached by the First Circuit – although not the legal standard that court adopted – was correct. Here, in contrast, there were no such stipulations or findings.

tion, *Parker* and its progeny teach that, under principles of federalism, the strong national policy in favor of competition gives way to the considered judgment of the State. But forms of state involvement or monitoring that do not rise to this level, if allowed to confer antitrust immunity, would shield anticompetitive conduct that the State has not determined to be desirable. To hold such private conduct immune from the federal antitrust laws would extend *Parker* beyond its federalism rationale.

The court of appeals' toothless legal standard effectively abandons the active supervision requirement, leaving in place only the companion requirement that the restraint be "clearly articulated and affirmatively expressed as state policy." *Midcal,* 445 U.S. at 105. The resulting expansion of antitrust immunity would create a chasm in which private anticompetitive activities are constrained neither by the federal antitrust laws nor by the State. Moreover, the court of appeals' standard actually would limit the States' regulatory options, by raising the possibility that a relatively modest state regulatory program may have the drastic and unintended consequence of immunizing private anticompetitive conduct from the constraints of the antitrust laws. The court of appeals' standard thus undermines the very principles of federalism on which it purports to be based.

C. Application of the Court of Appeals' Standard Led to an Incorrect Result in Wisconsin and Montana

The court of appeals watered-down active supervision test led it to determine, incorrectly, that respondents' price-fixing activity was immune from the federal antitrust laws in Wisconsin and Montana.[14] In both States, the

[14] There can be no doubt that respondents' price-fixing activities violated Section 5 of the FTC Act unless those activities are somehow exempt from the federal antitrust laws. Private price-fixing agreements are *per se* unlawful. See, *e.g., FTC* v. *Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, 434 n.16 (1990) (quoting 7 P. Areeda, *Antitrust Law* ¶ 1509, at 412-413 (1986)); *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 692-697 (1978); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 226 n.59 (1940). Indeed, no antitrust offense is more "dangerous to society." *Trial Lawyers Ass'n,* 493 U.S. at 434 n.16.

Commission found (and the court of appeals did not purport to reject the Commission's factual findings) that state officials did not determine whether respondents' collective rates were consistent with the States' regulatory criteria. See Pet. App. 61a, 74a. The court of appeals nevertheless held that state officials had engaged in a sufficient "basic level of activity" to confer antitrust immunity on respondents' price-fixing. In Wisconsin, the court relied on evidence that state officials "raised questions" about the 1971 filing and "later ruled that it was acceptable." Pet. App. 37a.[15] The court also noted that Wisconsin officials "checked [respondents'] 1981 filing for accuracy" and gave the 1982 filing "some review." *Ibid.* In Montana, the court relied on evidence that respondents submitted a "five page single-spaced cover letter" in support of their 1983 filing, and that a state official met with respondents and requested additional information (which there is no evidence respondents ever supplied), but told them their rate would go into effect immediately. *Id.* at 35a.

Although state officials in Wisconsin and Montana asked questions about the filings, and approved the filings as to form, they did not determine that respondents' rates were consistent with the States' policies.[16] Indeed, the

[15] In fact, the questions concerned only the geographic scope of respondents' uniform rates. Pet. App. 198a.

[16] The court of appeals stated that Wisconsin officials ruled that respondents' 1971 rate filing was "acceptable," Pet. App. 37a, and

Montana official's unanswered request for additional supporting data strongly supports the Commission's finding that Montana officials made no such determination. Because there is no basis for concluding that respondents' rates reflected anything other than their own desire to maximize profits, respondents' price-fixing was not exempt from the antitrust laws.[17]

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that Montana officials "approved" respondents' 1983 filing. Here and elsewhere in its opinion, the court of appeals failed to recognize that state officials can "approve" a rate filing in at least two senses. First, state officials can approve a rate schedule for filing, on the basis of a determination that it meets the formal and procedural requirements for filing. Second, state officials can approve the rates themselves, on the basis of a determination that they are consistent with the State's substantive regulatory criteria. Although officials in Wisconsin and Montana "approved" respondents' filings in the first sense, that does not constitute or imply approval in the second sense—*i.e.*, a determination that respondents' rates were consistent with state policy.

[17] The court of appeals stated that Wisconsin and Montana "satisfied the first two of the four *Midcal* and *324 Liquor Corp.* factors"—that is, Wisconsin "establishe[d] the rates" and "review[ed] the reasonableness of the rates." See Pet. App. 27a, 35a, 37a. In fact, however, it was respondents, not state officials, who established uniform rates through their rating bureaus. Moreover, the Commission found that state officials did not in fact review the reasonableness of the rates, and the court of appeals did not purport to overturn these findings. Thus, the court's conclusory statement that Wisconsin "satisfied the first two of the four *Midcal* • • • factors" can only be read as holding, as a matter of law, that because the States met the "basic level of activity" test, they both "established" the rates and "reviewed the reasonableness of the rates." That plainly misreads this Court's decisions in *Midcal*, *324 Liquor*, and other cases.

D. The Court of Appeals Erroneously Relied On the Asserted Availability Of Mandamus Proceedings In State Court As A Basis for Finding Active Supervision

The court of appeals was also incorrect in concluding that Wisconsin and Montana grant private parties a right to seek a writ of mandamus from a state court, and in suggesting that such a means for compelling state officials to determine whether a particular rate meets the State's regulatory standards would be adequate to confer antitrust immunity. In this case, as in *Patrick* v. *Burget*, 486 U.S. at 104, the judicial review available to consumers, "if [it] exists at all, falls far short of satisfying the active supervision requirement." *Ibid.*

Mandamus is an extraordinary remedy; it is available only in the discretion of the court and is, in any event, not appropriate when the officer's duty requires the exercise of judgment and discretion. See *Jeppeson* v. *State Dep't of State Lands*, 205 Mont. 282, 288, 667 P.2d 428, 431 (1983) (mandamus "will not issue to compel performance of a discretionary function"); *Vretenar* v. *Hebron*, 144 Wis. 2d 655, 424 N.W.2d 714, 716 (1988) (mandamus is not appropriate "when the officer's duty is not clear and requires the exercise of judgment and discretion").

Wisconsin and Montana, joined by numerous other States, filed a brief in support of the petition for certiorari explaining that officials in those States have discretion to decide whether and to what extent to investigate a particular rate filing. See States' Br. 16-18. The statutory provisions cited by the court of appeals provide no support for its conclusion that state officials are required to determine whether every filed rate is consistent with the State's regulatory criteria. To the contrary, the state statutes support the States' argument that state officials have discre-

tion to decide whether to review particular rate filings.[18] Consequently, a state official's exercise of that discretion is not subject to judicial review in a proceeding for a writ of mandamus.

More fundamentally, we disagree with the court of appeals' suggestion that the mere availability of a state judicial remedy is sufficient to satisfy the requirement of active state supervision. See Elhauge, *supra,* 104 Harv. L. Rev. at 712-717. Judicial review is costly. Consumers may lack the financial resources necessary to detect abuses and bring a lawsuit to correct them. Even where consumers have the resources to pursue litigation, they may lack a sufficient incentive to do so. In many cases, the benefits of a successful lawsuit will be shared among many consumers, but the burden and expense of litigation will be borne by the few consumers who seek judicial review. In addition, judicial review occurs *ex post* rather than *ex*

[18] See Wis. Stat. Ann. § 625.11(1) (West 1980) ("Rates shall not be excessive, inadequate or unfairly discriminatory."); *id.* § 625.13 (insurers shall file all rates "within 30 days after they become effective); *id.* § 625.22 ("If the commissioner finds after a hearing that a rate is not in compliance with § 625.11, the commissioner shall order that its use be discontinued"); Mont. Code Ann. § 33-1-311 (1989) ("The commissioner shall enforce the provisions of this code and shall execute the duties imposed upon him by this code."); *id.* § 33-16-201 ("Rates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.").

Although the States' brief confines its discussion to the law of Wisconsin and Montana, it appears that the laws of Arizona and Connecticut also give state officials discretion to review, or not to review, particular rate filings for compliance with the State's substantive criteria. See Ariz. Rev. Stat. Ann. § 20-365 (1990) ("The director *may* review * * * cooperative activities and practices") (emphasis added); Conn. Gen. Stat. Ann. § 38-201x(a)(2) (1987) ("A filing shall be deemed to meet the requirements of this chapter, unless disapproved by the commissioner"). See also *id.* § 38-201p (granting Commissioner discretion to hold a hearing upon request of an aggrieved individual).

ante. As a result, an anticompetitive practice that will ultimately be found to be inconsistent with State policy may remain in effect for months or even years. Consequently, the mere availability of state judicial remedies is not sufficient to satisfy the active supervision requirement.[19]

II. THE COURT OF APPEALS FAILED TO DEFER TO THE COMMISSION'S FINDINGS OF FACT

The court of appeals' error in departing from this Court's standard for active state supervision is compounded by its failure to accord proper deference to the Commission's findings of fact. The FTC Act provides that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). It is well settled that this provision "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.' " *FTC* v. *Indiana Federation of Dentists,* 476 U.S. 447, 454 (1986) (quoting *FTC* v. *Algoma Lumber Co.,* 291 U.S. 67, 73 (1934)). Instead, "[t]he weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *FTC,* 324 U.S. 726, 739 (1945).

The court of appeals disregarded these principles in reviewing the Commission's factual findings as to Arizona and Connecticut. Although the court stated that it was "exercis[ing] plenary review" only "over the FTC's application of the state action doctrine to the facts" of this case, Pet. App. 12a, the court in fact relied on isolated bits of

[19] Whether judicial review that has actually occurred could suffice to satisfy the active supervision requirement is a question that is not presented here.

evidence rather than accepting the Commission's weighing of all the evidence and the credibility of witnesses.

A. The Court of Appeals Disregarded the Commission's Findings With Respect To Arizona

In overturning the Commission's determination that there had been no showing that Arizona actively supervised respondents' price fixing, the court of appeals did not expressly overturn any of the Commission's findings of fact. But the court nevertheless disregarded the Commission's findings that there was "no convincing evidence that [respondents' 1968] rate was * * * reviewed by the state," Pet. App. 68a, that there was no evidence that various minor rate adjustments filed between 1968 and 1980 were justified, and that "the record is inconclusive as to the kind of review, if any" that the minor filings received. *Id.* at 67a. Instead, the court of appeals relied on three isolated pieces of evidence in the record, none of which justified rejection of the Commission's findings.

First, the court of appeals noted that, following respondents' 1968 rate filing, state officials "sought information as to how a component of the rates was derived." Pet. App. 31a. Although that is correct, it does not follow that state officials determined that respondents' rates were consistent with the State's substantive criteria. In fact, the State's inquiry did not relate to title search and examination fees at all, but instead concerned the insurance component of respondents' fees. See Pet. App. 202a-203a n.233.

Second, the court of appeals relied on testimony by an Arizona insurance official that "every filing submitted from 1973 to 1982 'was examined to see if it met the [State's] statutory requirements.' " Pet. App. 31a. That testimony, even standing alone, does not require an inference that state officials reviewed the merits of respondents' *1968* filing. Moreover, the Commission was entitled to weigh the official's testimony against other evidence in the record, including the same official's subsequent testimony that "no review was conducted between 1973 and 1982," and that he "could not recall any specific department review of various amendments." *Id.* at 66a.

Third, the court of appeals relied on the ALJ's finding that "no filing went into effect in Arizona until the director of the Insurance Department marked the filing 'approved.' " Pet. App. 31a. As we have noted, see note 16, *supra,* a state official may "approve" a rate schedule for filing (*i.e.*, determine that a rate schedule meets the formal requirements for filing) without approving the rates themselves (*i.e.*, determining that the rates are consistent with the State's substantive criteria). Here, the Commission found that state officials had not approved ~~of~~ respondents' rates in the second sense. The court of appeals was not entitled to disregard that finding on the basis of an ambiguous statement in the ALJ's initial decision.

B. The Court of Appeals Disregarded the Commission's Findings With Respect To Connecticut

The court of appeals also failed to accord sufficient deference to the Commission's factual findings with respect to Connecticut. The Commission found that crucial elements of respondents' rates "were not being supervised at all," and that state officials "simply ignor[ed] some [rate] filings because they [did] not involve generalized rate increases." Pet. App. 56a, 60a. Again, the court of appeals did not expressly reject any of the Commission's findings as unsupported by the evidence. But the court of appeals nevertheless relied on testimony by a state official that Connecticut reviews every rate it receives. Pet.

App. 33a. Again, the Commission was entitled to weigh this testimony against other evidence in the record, including evidence that state officials did not supervise insurer expenses, a key component of respondents' uniform rates, at all.

The court also stated that Connecticut officials had approved respondents' rate filings in 1966, 1981, and 1983. Pet. App. 33a. Again, the court of appeals overlooked the distinction between approval of rate schedules for filing and approval of the rates themselves as consistent with the State's substantive criteria. The Commission's ~~determination~~ finding that state officials did not make the second determination is supported by evidence that state officials did not supervise a key component of respondents' rates that was necessary to determine whether they met the State's regulatory standards, see *id.* at 59a, as well as by evidence that state officials never received the information they requested in support of respondents' 1966 filing, *ibid.*, and "approved" respondents' 1983 filing "even though [respondents] had yet to supply supporting data." *Id.* at 33a.

Finally, the court of appeals stated that the "basis" for the Commission's decision, as explained by Commissioner Strenio's separate opinion, was that Connecticut did not "meaningfully" supervise respondents' price-fixing because the FTC concluded that respondents paid excessive commissions to their agents. Pet. App. 33a-34a. Of course, statements in separate opinions are not statements of the Commision. And the statement in the Commission's opinion that Connecticut "regulators could not meaningfully regulate a critical component of the ratemaking process" refers to the Commission's finding that Connecticut officials "lacked the authority to control insurer expenses" as an element of ratemaking. Pet. App. 59a. Thus,

the Commission merely applied the principle that the active supervision requirement is not met where state officials do not "exer[t] any significant control over" the terms of the restraint. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 n.7 (1987).

In sum, the court of appeals' selective treatment of the record is contrary to the statutory requirement that the Commission's findings are conclusive if supported by evidence. Under the Commission's findings, which reflected a proper evaluation of the entire record and therefore should have been upheld, the "active state supervision" requirement was not met in Arizona or Connecticut.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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